

June 26, 2002

The Honorable John R. Edwards
United States Senate
225 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Edwards:

We write to you as individual members¹ of the faculty at the University of South Carolina School of Law. We are concerned that professors from law schools in your state recently may have provided you with inaccurate information regarding United States District Court Judge Dennis Shedd, whose nomination to the Fourth Circuit Court of Appeals is scheduled for a hearing in the Senate Judiciary Committee this week. As members of the academic legal community in South Carolina, we wish to set the record straight on Judge Shedd's record on the bench, and to urge your approval of this well-qualified nominee.

Contrary to claims made by his opponents, Judge Shedd's record in cases involving state sovereignty and the scope of congressional authority reflects that he has taken a fair and balanced approach to these issues and is well within the accepted mainstream among federal judges. On the difficult issue of whether Congress had authority under the Commerce Clause to enact the Driver's Privacy Protection Act (DPPA), Judge Shedd concluded, after careful analysis of existing case law, that DPPA violated the Tenth Amendment in that it commanded states to implement federal policy in violation of Supreme Court precedent, *New York v. United States*, 515 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). See *Condon v. Reno*, 972 F.Supp. 977 (D.S.C. 1997).

While the Supreme Court ultimately ruled that DPPA represented a valid exercise of Congress' Commerce Clause power, 7 of the other 15 lower court judges to consider the issue prior to the Court's decision agreed with Judge Shedd. Among those were Judge Barbara Crabb, the Chief Judge of the Western District of Wisconsin and an appointee of President Jimmy Carter, and John Godbold of the 11th Circuit, a Johnson appointee. In addition, several governors, including Governor Jim Hunt of North Carolina, authorized their attorneys general to file amicus briefs in *Condon* urging the Supreme Court to uphold Judge Shedd's ruling and to declare the law unconstitutional. To us, the disagreement among lawyers, judges and scholars

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regarding whether DPPA was constitutional in the wake of the Supreme Court's decisions in *Printz* and other opinions reflects the difficult question presented in this case. Judge Shedd's opinion represents a reasoned (albeit later overruled) approach to that question.

On the issue of state immunity under the Eleventh Amendment, opponents have cited Judge Shedd's opinion in the case of *Crosby v. South Carolina Dep't of Heath*, C.A. No. 3:97-3588-19BD, as an example of his "highly protective views" of state sovereignty. In *Crosby*, Judge Shedd in an unpublished opinion found that the 11th Amendment protected states from lawsuits in federal court under the Family and Medical Leave Act (FMLA). Contrary to the claims of his critics, Judge Shedd's opinion in *Crosby* is well within the mainstream of recent Eleventh Amendment jurisprudence. In fact, eight of the nine Circuit Courts of Appeals to decide the issue of whether the FMLA applied to state agencies have agreed with Judge Shedd's ruling in *Crosby*. See *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir 2001); *Hale v. Mann*, 219 F.3d 61 (2nd Cir 2000); *Chittister v. Dept. Community and Econ. Dev.*, 226 F.3d 223 (3rd Cir 2000); *Lizzi v. WMATA*, 255 F.3d 128 (4th Cir 2001); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir 2000); *Sims v. Cincinnati*, 219 F.3d 559 (6th Cir 2000); *Townsell v. Missouri*, 233 F.3d 1094 (8th Cir 2000); *Garrett v. UAB Board of Trustees*, 193 F.3d 1214 (11th Cir 1999). In fact, the Fourth Circuit opinion on this issue was joined by recent Bush appointee Roger Gregory, who was unanimously approved by the Judiciary Committee and unanimously confirmed by the full Senate. See *Lizzi v. WMATA*, 255 F.3d 128 (4th Cir 2001).

Those less familiar with Judge Shedd's record also may not be aware of his opinion in another case involving the scope of Congress' authority under the Commerce Clause. In *United States v. Floyd Brown*, Crim. No. 94-168-19, Judge Shedd in an unpublished opinion rejected a criminal defendant's constitutional challenge to the Gun Free School Zones Act, finding that the prosecution could prove facts at trial that would support some basis for federal jurisdiction under the statute. Consequently, Judge Shedd found that the Act represented a valid exercise of congressional authority under the Commerce Clause. The Supreme Court later disagreed with Judge Shedd and struck down the Act in a controversial 5-4 decision. See *United States v. Lopez*, 514 U.S. 549 (1995). Nonetheless, Judge Shedd's opinion in *Brown* demonstrates that he is far from the "sympathetic participant in the campaign to disempower Congress" that his detractors have alleged.

Even more disturbing than their criticism of Judge Shedd's record on federalism issues is the North Carolina law professors' distortion of his record in civil rights and employment discrimination cases. While we will not address each and every mischaracterization contained in their recent letter to you, suffice it to say that those professors clearly have not provided you with the full picture of Judge Shedd's record.

For example, the assertion that Judge Shedd has never granted relief in an employment discrimination case and that he inappropriately uses Rule 56 summary judgment in these cases is misleading and inaccurate. As you must know from your career as a litigator, when a case proceeds beyond the summary judgment stage, the likelihood of settlement in that case increases exponentially. Moreover, an extremely high percentage of employment discrimination cases around the country are disposed of by summary judgment either because the courts consider the claims not to be meritorious or because the plaintiff failed to meet the minimal requirements set by statute and judicial precedent. We understand that Judge Shedd has repeatedly denied summary judgment to defendants in employment discrimination and civil rights cases. In addition, we are aware of only two instances in which the Fourth Circuit has overturned Judge Shedd in employment discrimination cases during his almost twelve-year career on the bench.

For your information, we wanted you to be aware of a few of the cases (among many) where Judge Shedd allowed plaintiffs to proceed past the summary judgment stage in civil rights and employment cases:

In *Miles v. Blue Cross & Blue Shield*, C.A. No. 3:94-2108-19BD, Judge Shedd denied defendant Blue Cross & Blue Shield's motion for summary judgment in a case brought under Title VII of the Civil Rights Act, where an African-American employee alleged that she was fired because of her race. The case included allegations that the plaintiff's supervisor used racially disparaging remarks on several occasions. The supervisor also allegedly stated that he did not want an African-American to hold the position held by the plaintiff.

In *Davis v. South Carolina Department of Health*, C.A. No. 3:96-1698-19BD, Judge Shedd refused to dismiss a Title VII lawsuit by an African-American employee who claimed that she was denied a promotion because of her race. The case involved allegations that the company promoted an unqualified white employee, and that a supervisor who participated in the decision not to promote the plaintiff had made racially disparaging remarks to her.

In *Ruff v. Whiting Metals*, C.A. No. 3:98-2627-19BD, Judge Shedd refused to dismiss a Title VII race discrimination case brought by an African-American welder after he was laid off. The case involved allegations that supervisors repeatedly made racial statements in the workplace, and that one supervisor claimed that he was going to use the pending layoffs to "get rid of some" African-American employees.

In *Black v. Twin Lakes Mobile Homes*, C.A. No. 0:97-3971-19, Judge Shedd denied

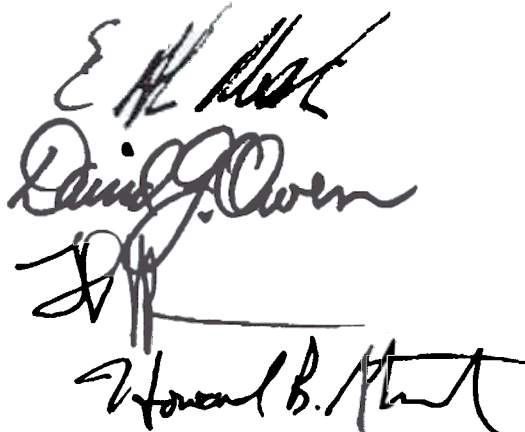
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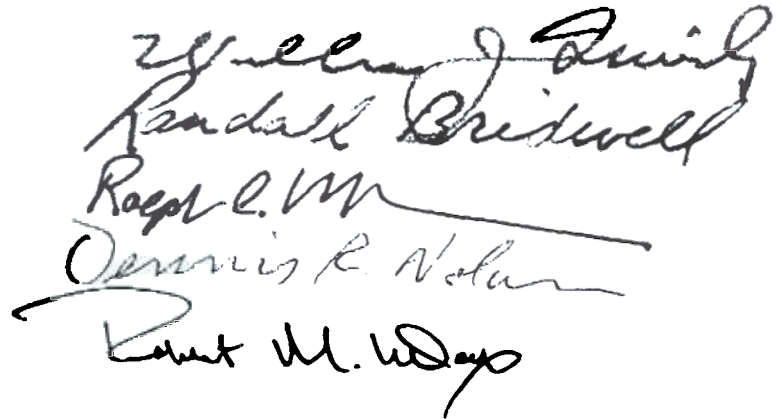
summary judgment for the defendant, an owner of a mobile home park who sought to evict an HIV-positive tenant because of his medical condition. Shedd's ruling allowed the plaintiff's lawsuit alleging discrimination under the Fair Housing Act to go forward.

In addition to the above cases, Judge Shedd also has presided over three cases where the NAACP has alleged violations of the Voting Rights Act in which the NAACP prevailed. *NAACP v. Lee County*, C.A. No. 3:94-1575-17; *NAACP v. Holly Hill*, C.A. No. 5:91-3034-19; *NAACP v. Town of Ellore*, C.A. No. 5:91-3106-06. Far from displaying a hostility to civil rights and employment discrimination cases, Judge Shedd's record demonstrates that he is a judge who keeps an open mind, applies the law to the facts, and treats all parties fairly.

In sum, as members of the academic legal community in South Carolina, we can unequivocally state that Judge Shedd's record on the federal bench demonstrates that he is fair and impartial in all matters that come before him, including to plaintiffs in employment discrimination and civil rights cases. In addition, his career on the bench and as a staff member of the United States Senate shows that he has a clear understanding of and appropriate deference to Congress' legislative powers. In our view, he will make an excellent addition to the Fourth Circuit, and we urge you to support his nomination.

Sincerely,





cc: The Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate
The Honorable Orrin G. Hatch, Ranking Republican Member, Committee on the
Judiciary, U.S. Senate
The Honorable Strom Thurmond
The Honorable Ernest F. Hollings